

Petition Preparer  
11 USC § 110  
Excessive fees  
Deceptive advertising  
Unauthorized practice of law

U.S. Trustee v. Barry Taub, Adversary No. 01-6022-fra  
In re Richard and Jessica Bercume, Case No. 600-66536-aer7

8/21/2001 FRA

Unpublished

A trial was held in the U.S. Trustee's action against petition preparer Taub for injunctive relief relating to fraudulent and unfair advertising practices and for disgorgement of excessive fees charged in four bankruptcy cases which were joined for purposes of the adversary proceeding.

**Excessive Fees:** The court declined to provide a standard or presumptive fee which all petition preparers would be subject to. Instead, it held that the proper method to determine what a petition preparer could charge under 11 U.S.C. § 110 is to use the "lodestar method," by which the court determines a reasonable hourly rate and applies that to a reasonable time for preparation. The court determined that \$50 is a reasonable hourly fee in the Eugene Division. In three of the cases, the court determined that three hours was reasonable preparation time and in the fourth case that four hours was reasonable.

While the Bankruptcy Court in Oregon looks to the state for standards as to what constitutes the unauthorized practice of law, the court stated that the federal court has both the inherent and the statutory authority to regulate both those who practice before it as well as petition preparers. Based on that authority, the court determined that Taub had engaged in the unauthorized practice of law in one of the bankruptcy cases in which he exercised his independent judgment with respect to a legal matter. He would therefore be required to remit to the trustee the \$299 he charged to prepare the petition in that case. Because there had been no guidance in this jurisdiction regarding appropriate fees, the court did not require Taub to remit the portion of the fees in the other three cases which were found to be excessive.

**Unfair and Deceptive Advertising:** Taub had been advertising his services at "\$99 and up" and a week before trial had registered as a trade name "Bankruptcy \$99," although very few people actually qualified for and paid \$99 to have a bankruptcy petition filed. The court stated that similar standards should be applied as in unfair trade practices cases and held that the advertising was false and misleading. Taub was enjoined from advertising "99

and up" without giving further detail and from using the phone listing "Bankruptcy \$99."

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UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF OREGON

In Re:	)	Adversary Proceeding No.
	)	601-6022-fra
UNITED STATES TRUSTEE,	)	
	)	
Plaintiff,	)	
v.	)	
	)	
BARRY L. TAUB,	)	
	)	
Defendant.	)	
	)	Bankruptcy Case No.
RICHARD BERCUME and	)	600-66536-aer7
JESSICA BERCUME,	)	
	)	
Debtors.	)	
	)	Bankruptcy Case No.
JOEL GREENWALDT and	)	600-67210-aer7
KATHERINE GREENWALDT,	)	
	)	
Debtors.	)	
	)	Bankruptcy Case No.
GREGORY VANORMAN and	)	600-67625-aer7
DIANA VANORMAN,	)	
	)	
Debtors.	)	
	)	Bankruptcy Case No.
JAMES SIMMONS and	)	601-60088-aer7
TERESA SIMMONS,	)	
	)	MEMORANDUM OPINION
Debtors.	)	

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I. INTRODUCTION

The United States Trustee ("UST") commenced an adversary proceeding against Barry L. Taub alleging that Taub charged an excessive fee for preparing a bankruptcy petition and related forms. 11 U.S.C. § 110(h)(2). The complaint further challenges Taub's advertising practices as "fraudulent, unfair or deceptive." After the adversary proceeding was commenced, the parties agreed to join motions by the UST in three separate cases similarly seeking return of fees deemed by the UST to be excessive.

The matter was heard on August 1 through 3, 2001. The Court heard detailed evidence regarding the cases at hand, Taub's practices and those of other document preparers, and the practices and charges of paralegals employed by local attorneys.

The issues presented are:

1. Whether the amounts charged by Taub in these cases exceeded the value of the services. This determination requires consideration of what services may be lawfully performed, and how such services should be valued.
2. Whether advertising a very low, but seldom employed, flat fee for services is subject to being enjoined under Code § 110 as an unfair or deceptive practice.

I find that reasonable fees in the cases before me do not exceed \$200. I further find that Taub's advertising practices should be enjoined. My reasons follow.

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1 II. FACTS

2 Taub does business in Eugene, Oregon, as a legal document  
3 preparer. He prepares, for a fee, petitions and related forms for  
4 use by unrepresented parties in divorces and bankruptcy proceedings.  
5 His activities place him within the definition of "bankruptcy  
6 petition preparer" set out in Code § 110(a)(1).

7 Taub advertises his services in the Eugene area yellow pages  
8 with an ad under the heading "bankruptcy services." The text of the  
9 ad reads: "Bankruptcy as low as \$99/18 years experience/Avoid high  
10 lawyer fees (court fees extra)/B. Taub paralegal [local phone  
11 number]." An ad regularly run in a weekly classified ad circular  
12 reads: " Divorce/Bankruptcy \$99 and up/Avoid high lawyer fees!/18  
13 years - satisfaction guaranteed/B. Taub Debt Clinic [local phone  
14 number]." Copies of the ads are set out in the appendix to this  
15 opinion. In addition, under the heading of "paralegals" Mr. Taub's  
16 business is listed under "Bankruptcy \$99," along with his office's  
17 address and phone number. The name was registered as an assumed  
18 business name just a week prior to trial.

19 In a typical case a prospective customer calls Mr. Taub, who  
20 conducts a short interview to learn of the nature of the proposed  
21 bankruptcy filing. Based on that information he quotes a price. If  
22 the customer agrees, Taub sends by mail a form letter confirming the  
23 quoted price. The letter also provides instructions for filling out  
24 forms provided for use in listing assets and obligations. The  
25 letter advises the customer of what financial documents to bring in,  
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1 and includes a form, to be filled in by the customer, listing  
2 current expenditures. The customer is advised to call to make an  
3 appointment when he or she is ready to proceed.

4         At the appointed time, Taub meets with the customer and  
5 reviews the forms. The meeting begins with the execution of a  
6 "customer agreement," in which the customer acknowledges what  
7 services are desired, the agreed fee, and that Mr. Taub is not an  
8 attorney and is prohibited from giving legal advice. Taub proceeds  
9 to obtain information from the customer necessary to complete the  
10 petition and schedules. A memorandum prepared by Taub and submitted  
11 as Exhibit N, sets out that, with respect to each schedule Taub will  
12 "review with customer any missing information needed to be provided,  
13 customer questions and either answer or refer customer to attorney  
14 as appropriate."

15         After the necessary information is obtained, the meeting ends  
16 and Taub prepares the petition and schedules, using software  
17 marketed by a prominent legal publisher. The software itself  
18 contains a considerable amount of information, including addresses  
19 used by major creditors in consumer cases such as credit card  
20 issuers and large retailers.

21         Once the forms are completed there is a second interview to  
22 review and sign them. Taub has the customers sign a "termination  
23 document," in which the customer again acknowledges that no legal  
24 advice has been rendered.

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1           Taub's practices are generally consistent with those of other  
2 petition preparers who testified. Some abstain from interviewing  
3 customers, simply handing out blank forms and transcribing them,  
4 either through software or using blank forms. Taub testified that  
5 he believes the interview method is preferable, because it ensures  
6 that the information obtained and then placed in the schedules is  
7 more complete and accurate.

8           Respecting his charges, Taub testified that the amount he  
9 charges varies with the circumstances of each case. Factors  
10 justifying charges higher than the advertised \$99 include whether  
11 the filing involves a husband and wife, the ownership of vehicles  
12 (or, presumably, other assets), and the number of creditors. Other  
13 petition preparers testified that the number of creditors is an  
14 important factor since including the names and addresses of  
15 creditors in the matrix and schedules is the most time consuming  
16 aspect of preparation. Another consideration was whether the  
17 petition was being filed on an "emergency" basis because of  
18 exigencies such as looming foreclosures. The \$99 fee is, according  
19 to Mr. Taub's testimony, limited to single filers with "very simple"  
20 cases, which generally involve fewer than 10 creditors and low  
21 income.

22           Respecting the individual cases before the Court, the  
23 testimony and exhibits establish the following:

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1 **VanOrman**

2       After determining that a bankruptcy was necessary, Mr.  
3 VanOrman contacted two attorneys, each of whom required over \$1,000  
4 in fees.<sup>1</sup> Mr. VanOrman then saw one of Mr. Taub's ads, and  
5 particularly the reference to \$99 and up. (As Mr. VanOrman put it:  
6 "All I saw was the \$99.") He phoned Taub, who advised that the cost  
7 depended on the particular case. After inquiring into the number of  
8 creditors and vehicles, he quoted Mr. VanOrman a fee of \$399, and  
9 said that the fee was higher than \$99 because of the vehicles.

10       Mr. VanOrman agreed to the \$399 fee which was paid to Taub at  
11 the parties' first meeting. Taub asked the customer to complete a  
12 blank Schedule C, setting out claimed exemptions, advising him to  
13 use "current values" for assets claimed to be exempt.

14       After the initial meeting, Taub prepared the petition and  
15 schedules as requested. There was at least one discrepancy between  
16 the rough draft done by the VanOrmans and Taub's work product: a  
17 \$500 per month credit card payment submitted by VanOrmans was  
18 excluded from the draft Schedule J. Taub explained that he left it  
19 off because the payments were not in fact being made by the time the  
20 VanOrmans decided to file their bankruptcy petition. Also at the  
21 final meeting a minor correction was made in the Statement of  
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23       <sup>1</sup> The debtors consistently testified that they were quoted \$1,000 or more  
24 by local attorneys. Testimony from attorneys and their employees, as well as the  
25 Court's observation of cases over the years, suggests that the standard fee in  
26 this area may be closer to \$600-\$800. Whether the debtors' testimony here is  
inflated, or they happened to call expensive attorneys, is not clear. What is  
clear, of course, is that filing a bankruptcy with the assistance of an attorney  
is considerably more expensive than using a petition preparer.



1 Affairs. Taub also provided a Statement of Intent (Bankruptcy Form  
2 521) and instructed the VanOrmans to complete the form and send  
3 copies to secured creditors.

4 According to the Debtor's testimony, the total meeting time  
5 was approximately 1.25 hours. Testimony established that a typical  
6 case requires anywhere from 30 to 90 minutes in input time. Taub  
7 testified that he did not maintain time records, but estimated that  
8 the total time devoted to the VanOrmans' case was four hours. The  
9 petition and schedules filed by the VanOrmans reveal no real  
10 property, two motor vehicles, \$400 cash on hand, and six creditors.

#### 11 **Bercume**

12 The Bercumes' bankruptcy was filed while they were in the  
13 process of divorcing. Mr. Bercume testified that Mrs. Bercume had  
14 advised him that a bankruptcy could be done for \$99 using Mr. Taub's  
15 services. He also testified that he read Taub's letter of October 2  
16 to Mrs. Bercume quoting a charge of \$349.

17 The Bercumes' schedules reveal that they have a residence and  
18 three cars, \$50 cash on hand, and 31 creditors.

#### 19 **Simmons**

20 Mrs. Simmons testified that she and her husband needed to  
21 file a bankruptcy on an "emergency" basis because their home was  
22 scheduled to be sold at foreclosure the following day. She decided  
23 to contact Mr. Taub after receiving quotes of over \$1,000 from one  
24 or more attorneys, and because she was attracted by the \$99 fee  
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1 quoted in Mr. Taub's ad. During the initial phone contact Mr. Taub  
2 quoted a fee of \$499.

3 Meetings between Taub and Mrs. Simmons took about an hour.  
4 Taub had to do some post-petition follow-up to ensure that the  
5 Simmons provided information necessary to file complete schedules  
6 after the "bare" emergency filing of the petition, matrix and  
7 Exhibit C. Taub's estimate of total time involved in the matter was  
8 six hours. The Simmons' schedules reveal a residence, two vehicles,  
9 \$50 cash on hand, and 11 creditors.

#### 10 **Greenwaldt**

11 The Greenwaldts contacted Taub after reading his  
12 advertisements. Taub quoted a fee of \$300 (the actual charge was  
13 \$299). He advised the Greenwaldts that he was charging a higher fee  
14 because their case was complicated by the fact that they were filing  
15 as a married couple, and that the filing involved a residence.

16 While they hoped they could get the job done for \$99, the  
17 Greenwaldts chose not to argue, at least in part due to a strong  
18 desire get the process over with.

19 After the initial interview, Taub prepared a petition and  
20 schedules. The Greenwaldts questioned the treatment of a 401(k)  
21 retirement plan in the schedules. The Greenwaldts' draft documents  
22 revealed that the account held approximately \$80,000, but was  
23 subject to a \$39,000 loan using the account as collateral. The  
24 forms the Greenwaldts filled out showed what they believed to be the  
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1 net value, that is, \$41,000, as the value of the fund. Taub's work  
2 product showed the \$80,000 gross value on Schedule C.

3 The discrepancy was pointed out, but Taub gave no  
4 explanation. Greenwaldts asked him to change the entry but he  
5 refused. They eventually relented, assuming that he knew what he  
6 was doing.

7 At at least one meeting Mrs. Greenwaldt pressed Taub hard for  
8 explanations, and about resources where she could learn more about  
9 the bankruptcy process. Taub replied by insisting that he could not  
10 give legal advice.

11 The Greenwaldts' petition shows a residence, three vehicles,  
12 \$25 cash on hand, and nine creditors.

### 13 III. DISCUSSION

#### 14 A. Preparer's Fees

15 The Bankruptcy Code regulates the fees charged to debtors by  
16 bankruptcy petition preparers by requiring that the preparers file a  
17 declaration disclosing any fee received, and that the Court disallow  
18 and require turnover to the trustee of any fee "found to be in  
19 excess of the value of the services rendered for the documents  
20 prepared." 11 U.S.C. § 110(h)(2).

21 The Code gives courts no guidance as to how the services of a  
22 bankruptcy petition preparer should be evaluated. The UST suggests  
23 three methods: the local market for such services, case law from  
24 other jurisdictions, and a "lodestar" approach in which the Court  
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1 determines a reasonable hourly fee, multiplied by a reasonable time  
2 to complete the petition and schedules.

3       *Local practices and the open market:* Evidence presented by  
4 the UST establishes that nine entities are responsible for over 90%  
5 of the cases filed using petition preparers. Excluding Taub, their  
6 fees range from \$139 to \$195, and average \$149. Mr. Taub's average  
7 is \$270, and the average including Taub is \$178.

8       The \$150 average is hardly surprising in light of the fact  
9 that the UST regularly advises petition preparers who charge more  
10 than \$150 that it will take them Court, as it has Mr. Taub, if they  
11 persist in doing so. Several preparers operating in the Eugene  
12 Division were so advised, and virtually all but Mr. Taub agreed to  
13 reduce their fees. Taub argues that the evidence of average fees  
14 charged cannot be relied on as an indicator of a fair market value,  
15 given the UST's intervention in the market. The argument is well  
16 taken. The Court cannot rely on market data if a majority of the  
17 participants of the market have unwillingly reduced their fees to  
18 the goal set by the UST.<sup>2</sup>

19       One preparer testified that she felt that preparers should be  
20 permitted to charge "whatever the market would bear." Some support  
21 for that notion can be drawn from the Code's reference to "value" of  
22 the services. In a free market economy it is ordinarily presumed  
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24       <sup>2</sup> This is not meant as criticism of the UST. The Code charges the UST with  
25 a duty to monitor fees and seek refunds where they are excessive. While the  
26 UST's determination of its trigger point is not binding on the Court, there is no  
reason to believe that his decision to object to fees in excess of \$150 was  
arbitrary or unreasonable.

1 that the value of a service is whatever the customer in an arm's  
2 length transaction is willing to pay for it. Refunds under Code  
3 §110 would, therefore, be ordered only when some defect in  
4 performance diminished the value to something less than the price.

5       The problem with this approach is its assumption that  
6 transactions with debtors are really at arm's length. To the  
7 contrary, Congress has determined that debtors are particularly  
8 vulnerable to sharp practices, and has closely regulated debtor's  
9 dealings with attorneys and other professionals. 11 U.S.C. § 327-  
10 330. The purpose of the regulation is to protect debtors from  
11 overreaching, In re Zepecki, 258 B.R. 719 (8<sup>th</sup> Cir. BAP 2001), and  
12 prevent inappropriate diminution of the estate, In re Bachman, 113  
13 B.R. 769 (Bankr. S.D. Fla. 1990). The same reasoning applies to  
14 petition preparers. In re Agyekum, 225 B.R. 695 (9th Cir. BAP 1998).

15       *Other precedent:* Case law from other jurisdictions tends to  
16 fall into one of two categories. One type denies fees altogether  
17 because of some failure or misconduct on the part of the preparer,  
18 or to set fairly low ceilings. See, e.g., In re Farness, 244 B.R.  
19 464 (Bankr. D. Id. 2000) (entire fee disgorged where preparer was  
20 engaged in unauthorized practice of law); In re Bradshaw, 233 B.R.  
21 315 (Bankr. D. N.J. 1999) (no fees permitted where services were  
22 useless in light of repeated dismissals). Another type sets fairly  
23 low maximum fees, on the theory that nothing more is done (or may be  
24 done) than providing a transcription service. In re Guttierrez, 248  
25 B.R. 287 (Bankr. W.D. Tx. 2000) (reasonable fee for transcription  
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1 service only cannot exceed \$50); In re Hartman, 208 B.R. 768 (Bankr.  
2 D. Mass. 1997) (preparer's fee limited to \$50); In re Moran, 256  
3 B.R. 842 (Bankr. D. N.H. 2001) (en banc) (\$30 per hour is a  
4 reasonable rate, and most petitions can be prepared in five hours or  
5 less: "Accordingly, the Court holds that, in general, petition  
6 preparers should be able to provide their petition preparation  
7 services in a routine individual or joint consumer bankruptcy case  
8 for \$150 or less").

9       *Reasonable rate and time:* The best approach is to consider  
10 the evidence at hand and ascertain a reasonable hourly rate for the  
11 preparer's services, and the amount of time reasonably necessary to  
12 complete the assigned task. This is the approach taken by the Moran  
13 court.

14       Divining an appropriate hourly rate is difficult. By  
15 alluding to the "value" of services, as opposed to "costs," the Code  
16 directs the inquiry not toward the preparer's overhead or costs, but  
17 to what the services are worth to the debtor. In other words, the  
18 value of the service is what it can be sold for in an arm's length  
19 transaction. The best evidence available to the Court in this case  
20 is what other providers, including law firms, receive for the  
21 services of non-lawyer personnel performing services substantially  
22 similar to those carried out by petition preparers. Several  
23 paralegals working for area law firms testified that their services  
24 were billed out at \$60-\$65 per hour. Presumably this figure  
25 includes the costs to the law firm of the paralegal's time, plus  
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1 overhead and a reasonable profit. An important distinction is that  
2 the paralegal employed by an attorney is subject to that attorney's  
3 supervision, which provides an extra measure of service and  
4 protection to the debtor. Bearing that in mind, I find that a  
5 reasonable hourly charge for a petition preparer's services in the  
6 counties within the Eugene Division of this Court is \$50 per hour.

7 Equally difficult is the determination of the amount of time  
8 that should be spent in each case. This requires at the outset a  
9 consideration of exactly what a petition preparer is permitted to  
10 do.

11 A petition preparer may be compensated only for activities  
12 lawfully undertaken. In re Guttierrez, 248 B.R. 287 (Bankr. W.D. Tx.  
13 2000); In re Farness, 244 B.R. 464 (Bankr. D. Id. 2000). These  
14 cases, and others like them, denied compensation to preparers who  
15 have performed incompetently, or whose activities have violated  
16 applicable law prohibiting the unauthorized practice of law.

17 The regulation of bankruptcy petition preparers is a matter  
18 of federal law. See 11 U.S.C. § 110, 18 U.S.C. § 156. Code  
19 §110(j)(2)(B) authorizes bankruptcy courts to permanently enjoin  
20 individuals from acting as bankruptcy petition preparers -- the  
21 equivalent of disbarment. While Code § 110(k) provides that  
22 "nothing in this section shall be construed to permit activities  
23 that are otherwise prohibited by law, including rules and laws that  
24 prohibit the unauthorized practice of law," the applicable rules are  
25 a matter of federal jurisdiction.

1 Federal courts have the inherent authority to regulate the  
2 conduct of persons practicing before them. See In re Poole, 222  
3 F.3d 618 (9<sup>th</sup> Cir. 2000) and cases cited therein. It stands to  
4 reason that the same authority over attorneys practicing in federal  
5 courts extends to petition preparers who prepare documents for  
6 filing in federal proceedings. While, as will be seen, federal  
7 courts look to state law to give definition to the concept of  
8 "practicing law," case and statutory law are well settled on the  
9 proposition that practice before federal courts, either as attorneys  
10 or as bankruptcy petition preparers, is ultimately to be controlled  
11 by the federal courts.

12 "Traditionally, when dealing with cases involving the  
13 unauthorized practice of law, the U.S. Bankruptcy Courts have looked  
14 to state law for guidance." In re Samuels, 176 B.R. 616, 620  
15 (Bankr. M.D. Fl. 1994) (cited by In re Stacy, 193 B.R. 31 (Bankr. D.  
16 Or. 1996)); In re Backman, 113 B.R. 769 (Bankr. S.D. Fl. 1990); In  
17 re Anderson, 79 B.R. 482 (Bankr. S.D. Ca. 1987). While supremacy  
18 clause considerations preclude states from regulating the practice  
19 of law before federal tribunals, see Sperry v. Florida, 373 U.S. 379  
20 (1963), the federal tribunal may look to state law in prescribing  
21 qualifications. In re Bright, 171 B.R. 799 (Bankr. E.D. Mich.  
22 1994).

23 The Bankruptcy Court in Oregon looks to Oregon law to define  
24 what constitutes the unauthorized practice of law. U.S. Trustee v.  
25 Tank (In re Stacy), 193 B.R. 31 (Bankr. D. Or. 1996). The Oregon  
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1 Legislature has not provided a statutory definition of the practice  
2 of law. Oregon's courts have declined to craft a bright-line  
3 definition, preferring to let the law develop on a case by case  
4 basis. However, two leading cases provide standards to apply to the  
5 matter at hand.

6 Oregon State Bar v. Security Escrows, Inc., 233 Or. 80, 377  
7 P.2d 334 (1962), involved an action by the State Bar to enjoin an  
8 escrow company from preparing conveyances and other instruments  
9 related to real property transactions. Noting that "the exercise of  
10 discretion concerning the property rights of another should be  
11 entrusted only to those learned in the law" [emphasis in original],  
12 the Court held that

13 for the purposes of this case. . .the practice of law  
14 includes the drafting or selection of documents and  
15 the giving of advice in regard thereto anytime an  
16 informed or trained discretion must be exercised in  
17 the selection or drafting of a document to meet the  
18 needs of the persons being served. The knowledge of  
19 the customer's needs obviously cannot be had by one  
who has no knowledge of the relevant. One must know  
what questions to ask. Accordingly any exercise of an  
intelligent choice, or an informed discretion in  
advising another of his legal rights and duties, will  
bring the activity within the practice of the  
profession.

20 233 Or. at 89, 337 P.2d at 339. The Court went on to say that "the  
21 line is drawn at the point where there is any discretion exercised  
22 by the escrow agent in the selection or preparation for another of  
23 an instrument, with or without costs."

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1           On the other hand, filling in blanks in forms preselected by  
2 the customer does not constitute the practice of law. The Court  
3 elaborated on this point, noting that

4           One of the facts of modern life is that most routine  
5 conveyancing, as a practical matter, has been allowed  
6 to drift away from lawyers and into the hands of  
7 stationers, notaries and others. This phenomenon may  
8 be the result of a default by the legal profession.  
9 It may also be the result of a diffusion of  
10 superficial knowledge in such matters. Whatever the  
11 cause, it is now too late to rise [sic] the cry of  
12 "unauthorized practice of law" each time a lay  
13 conveyancer fills in the names, dates and description  
14 on the simple form of a warranty deed by which one  
15 husband and wife combination ordinarily conveys a city  
16 lot to another husband and wife as tenants by the  
17 entirety. Granting that the drafting of such a  
18 conveyance historically was within the practice of  
19 law, we hold that the filling in of forms as directed

20           by customers under modern business conditions is not  
21 the practice of law.

22           233 Or. at 91-92, 377 P.2d at 340 (Footnotes omitted).

23           In Oregon State Bar v. Gilchrist, 272 Or. 552, 538 P.2d 913  
24 (1975), the Court was confronted with the then relatively new  
25 phenomenon of sales of so-called "divorce kits" containing sample  
26 forms and instructions for use in initiating divorce proceedings.

          [I]n the advertising and selling of their divorce kits  
the defendants are not engaged in the practice of law  
and may not be enjoined from engaging in that part of  
their business. We further conclude, however, that  
all personal contact between defendants and their  
customers in the nature of consultation, explanation,  
recommendation or advice or other assistance in  
selecting particular forms, in filling out any part of  
the forms, or suggesting or advising how the forms  
should be used in solving the particular customer's  
marital problems does constitute the practice of law  
and must be and is strictly enjoined.

1 272 Or. at 563-564, 538 P.2d at 919.

2 Read together, Security Escrows and Gilchrist demonstrate  
3 that nonlawyers such as bankruptcy petition preparers may assist  
4 customers in filling out petitions and schedules, so long as the  
5 preparer exercises no independent discretion, and does not influence  
6 the debtor in his or her choices regarding the forms. Petition  
7 preparers may meet with customers for the purpose of eliciting the  
8 information required by the forms, and in order to ensure that the  
9 preparer is accurately setting out what the customer requires. The  
10 preparer may also ensure that the forms are completely filled out.<sup>3</sup>

11 Gilchrist does not prohibit such consultations between the  
12 preparer and customer. Read in light of Security Escrows and cases  
13 such as Oregon State Bar v. Fowler, 278 Or. 169, 563 P.2d 674  
14 (1977), Gilchrist prohibits the preparer's involvement in the  
15 selection of forms and decisions about their use, and any  
16 determination as a matter of "informed discretion" as to what  
17 information is to be put in them. It does not prevent the preparer  
18 from, for example, asking the customer what property he owns and  
19 putting the answers in the schedules, since the question appears in  
20 the schedules.

21 Applying these principles to the cases presented, it appears  
22 that Taub, while generally organizing his handling of these cases in  
23 a lawful manner, did cross the line by exercising discretion on at  
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25 <sup>3</sup> Bankruptcy petitioners are, of necessity, not engaged in the selection of  
26 forms in Chapter 7 bankruptcies. The forms are standardized, and all are  
mandatory.

1 least one occasion. He exercised discretion when he determined that  
2 the appropriate way to schedule the Greenwaldts' pension was by  
3 stating its gross value. It does not matter that Taub's approach  
4 was the correct one: the law clearly dictates that the customer is  
5 the only person entitled to discretionary action, whether the  
6 discretion is more or less informed than the petition preparer's.<sup>4</sup>

7 In his defense Taub asserts that he was required to make  
8 these changes by 18 U.S.C. § 156(b).<sup>5</sup> He argues that this provision  
9 creates an independent standard for bankruptcy petition preparers  
10 which must in all cases be complied with. Allowing information  
11 known to him to be incorrect to remain on a petition he prepares  
12 would constitute a knowing attempt to disregard the requirements of  
13 the Code, thus subjecting him to liability in the event the case is  
14 dismissed.

15 The argument overlooks the fact that the preparer is not  
16 compelled to produce the documents. If a customer directs the  
17 preparer to include information the preparer knows to be inaccurate,  
18 or insists on excluding information the preparer knows should not be

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21 <sup>4</sup> Taub also unilaterally changed the VanOrmans' Schedule J to reflect the  
22 fact that they had discontinued their \$500 per month credit card payments.  
23 Giving him the benefit of the doubt, I conclude that this was merely the  
24 correction of a factual mistake brought to Taub's attention during the interview  
25 process, rather than Taub's exercise of discretion with respect to a legal  
26 matter.

<sup>5</sup> 18 U.S.C. § 156(b): "Offense. - If a bankruptcy case or related proceeding  
is dismissed because of a knowing attempt by a bankruptcy petition preparer in  
any manner to disregard the requirements of Title 11, United States Code, or the  
Federal Rules of Bankruptcy Procedure, the bankruptcy petition preparer shall be  
fined under this Title, imprisoned not more than one year, or both."

1 excluded, the preparer's duty is to point out the error or omission,  
2 without explanation, advise the customer to seek legal advice, and  
3 to decline to proceed further. Any fee unearned at that point  
4 should be returned.

5 In light of these criteria, bankruptcy petition preparers may  
6 charge for the time spent interviewing clients for the purpose of  
7 ascertaining the information to be placed into the forms, and the  
8 time spent in preparing the forms themselves. The testimony  
9 presented by people who prepare forms on a regular basis, both as  
10 in-house paralegals and as petition preparers, supports a finding  
11 that the time spent in the Burcume, Greenwaldt and VanOrman matters  
12 was three hours. Given the exigencies of the emergency filing and  
13 difficulties in communication (which I do not attribute to the  
14 preparer) the time attributable to the Simmons case is four hours.  
15 In each case I find the time spent to be reasonable.

16 In most cases, it is virtually impossible to separate  
17 discussions, interviews or preparation which violate rules against  
18 the unauthorized practice, from those that do not. Where  
19 unauthorized practice occurs, it should be presumed, subject to  
20 rebuttal by the preparer, that the entire transaction is tainted and  
21 that the entire fee should be refunded. See In re Guttierrez, 248  
22 B.R. 287 (Bankr. W.D. Tx. 2000); In re Farness, 244 B.R. 464 (Bankr.  
23 D. Id. 2000).

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1           Accordingly, no fees should be awarded in the Greenwaldt  
2 case. Fees in Burcume and VanOrman should be limited to \$150, and  
3 in the Simmons case to \$200.<sup>6</sup>

4           The Court has the equitable power to forego an order that  
5 fees be disgorged if, all things considered, disgorgement would be  
6 inequitable. Since there has been no guidance in this jurisdiction  
7 regarding the appropriate fees to be charged, the Court will not  
8 order disgorgement of fees in the Bercume, VanOrman and Simmons  
9 cases. However, since clearly defined rules regarding the  
10 unauthorized practice of law were violated in the Greenwaldt matter,  
11 those fees must be disgorged.

12           The UST asks that Taub be enjoined from charging and  
13 collecting excessive fees in the future, pursuant to  
14 11 U.S.C. §110(j)(2)(A). This section provides for such relief if  
15 it is found to be necessary to prevent the recurrence of proscribed  
16 conduct. The record does not support a finding that Taub will

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19           <sup>6</sup>The UST urges the Court to set "guidelines" for use by the UST and  
20 bankruptcy petition preparers. Congress has not authorized the Courts or the UST  
21 to set specific limits, and it is the duty of the Court not to legislate a fee  
22 schedule, but to decide the merits of the case before it. Accordingly, I decline  
23 to pronounce a standard fee for all cases. See Consolidated Memorandum Regarding  
24 Bankruptcy Petition Preparers, 1997 WL 615657 (Bankr. D. Me. 1997).

25           It is true that courts may recognize presumptive fees, for example, by  
26 setting a "no questions asked" amount and strictly scrutinizing charges higher  
than that amount. See, e.g., In re Agvekum, 225 B.R. 695 (9<sup>th</sup> Cir. BAP 1998), In  
re Agnew, 144 F.3d 1013 (7th Cir.1998) (Attorneys fees), Moran, 256 B.R. 842  
(Bankr. D. N.H. 2000) (en banc). This approach is similar to that used in setting  
attorneys fees in Chapter 13 cases in this District. The rationale is that  
courts may indulge in such presumptions in order to avoid being overrun by  
demands for hearings in hundreds of cases involving fees. However, I believe  
that such presumptions should be prescribed, if at all, by way of local rule or  
general order. This ensures a common standard for the District.

1 continue to charge excessive fees in the future. Accordingly,  
2 injunctive relief will not be ordered.

### 3 **B. Advertising Practices**

4 It is clear from the testimony that Taub's customers were  
5 attracted by his "\$99 and up" advertisement. It is equally clear  
6 that:

7 (1) very few people will qualify for the bottom rate; and

8 (2) the prevailing charges for most likely customers is three  
9 times greater.

10 Taub's approach is very much like a "bait and switch." He  
11 entices customers with a rate that few are likely to qualify for,  
12 and then sells them a service for several times as much money. The  
13 fact that the customers go along with this, whether out of  
14 impatience, urgency, or other reason is immaterial. Nor does it  
15 matter that the ads say (in smaller print) "\$99 and up."

16 Taub argues that the UST must establish each of the elements  
17 of common law fraud, citing to Turtle Rock Meadows Homeowners Assoc.  
18 v. Slyman (In re Slyman), 234 F.3d 1081 (9<sup>th</sup> cir. 2000). Slyman  
19 involves a complaint to deny discharge under 11 U.S.C. § 523(a)(2),  
20 and is inapposite. The standards applicable under Code §110 are  
21 more akin to those established in unfair trade practice cases. In  
22 determining whether or not advertising is false or misleading, the  
23 Court must regard not fine spun distinctions and arguments made to  
24 excuse the advertisement, but the effect which it might reasonably  
25  
26

1 be expected to have on the general public. P. Lorillard Co. v.  
2 Federal Trade Commission, 186 F.2d 52 (4<sup>th</sup> Cir. 1950). As one court  
3 stated respecting trademarks<sup>7</sup>: "The law is not made for the  
4 protection of experts, but for the public - that vast multitude  
5 which includes the ignorant, the unthinking and the credulous, who,  
6 in making purchases, do not stop to analyze, but are governed by  
7 appearances and general impressions." Florence Manufacturing Co. v.  
8 J.C. Dowd & Co., 178 F. 73, 75 (2<sup>nd</sup> Cir. 1910).

9 Further guidance may be had by resort to Oregon's Unfair  
10 Trade Practices Act, ORS 646.605 to 646.656. In Saunders v.  
11 Francis, 277 Or. 593, 561 P.2d 1003 (1977), the Court held that a  
12 complaint which alleged that defendants advertised an automobile for  
13 sale with an intent not to sell it as advertised (that is, not at  
14 the advertised price) stated a claim under ORS 646.608(i), which  
15 prohibits advertisement of goods or services "with intent not to  
16 provide them as advertised."

17 Taub prepared petitions in 266 cases between January 1, 2000  
18 and June 1, 2001. Of these, only three carried a charge of \$99.  
19 One was for \$149; the next "step" was \$199. It is unfair to  
20 advertise a service for \$99, or even "\$99 and up," if barely 1% of  
21 the customers qualify for it.

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24 <sup>7</sup> Recall that Taub has registered "Bankruptcy \$99" as an assumed business  
25 name.



1           The effect of Taub's advertisement is to entice customers who  
2 cannot qualify for the advertised price. The advertisements are  
3 deceptive for purposes of 11 U.S.C. § 110, unless their reference to  
4 \$99 is put in context by providing information about who qualifies  
5 for that rate, or what other rates are charged for more typical  
6 cases.

7           The Court will not attempt to write Taub's advertising for  
8 him by setting out in detail what is permitted and what is not. It  
9 suffices that the particular advertising now in place, and the phone  
10 directory entry of "Bankruptcy \$99" are deceptive practices  
11 prohibited by the Bankruptcy Code, which should be enjoined.

#### 12 **C. Certification of Violation**

13           Code § 110(i)(1) requires that the Court, if it finds that a  
14 bankruptcy petition preparer has violated any part of § 110, or  
15 committed any fraudulent, unfair or deceptive act, should certify  
16 the facts to the District Court. In light of the Court's findings  
17 regarding excessive fees and advertising practices, the Court's  
18 judgment in this case shall include such a certification.<sup>8</sup>

#### 19 **IV. CONCLUSION**

20           1. Mr. Taub shall be ordered to remit to the estate the \$299  
21 charged in the Greenwaldt case. No disgorgement is required with  
22 respect to the Bercume, VanOrman and Simmons cases.

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24           <sup>8</sup> The Complaint sought other relief, including a permanent injunction from  
25 acting as a petition preparer. These claims were excluded from the pretrial  
26 order, and presumably withdrawn.

1           2. Mr. Taub shall be permanently enjoined from advertising  
2 his services for "\$99 and up," without further detail, and from  
3 using the phone listing "Bankruptcy \$99."

4           3. This Court's findings regarding Taub's advertising  
5 practices shall be certified to the District Court.

6           This Memorandum Opinion constitutes the Court's findings of  
7 fact and conclusions of law. Counsel for the UST shall prepare a  
8 judgment consistent with the foregoing.

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11                               FRANK R. ALLEY, III  
12                               Bankruptcy Judge  
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